

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 20, 2009 Session

INGRID MARIA ROGERS v. ROBERT DONALD ROGERS

**Appeal from the Chancery Court for Rutherford County
No. 03-7615DR Royce Taylor, Judge**

No. M2008-00918-COA-R3-CV - Filed April 16, 2009

In this parental relocation case, mother seeks to move to Germany with the parties' two minor children. We have determined that the evidence preponderates against the trial court's finding that the mother's relocation had a reasonable purpose. We, therefore, reverse the trial court's decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Gregory Dye Smith and Rebecca Kathryn McKelvey, Nashville, Tennessee, for the appellant, Robert Donald Rogers.

Laurie Young, Murfreesboro, Tennessee, for the appellee, Ingrid Maria Rogers.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

Ingrid Maria Rogers ("Mother") and Robert Donald Rogers ("Father") were married in 1992 and have two children, a son born in 1993 and a daughter born in 1998. Mother is a native of Germany, and the children have dual citizenship.

Mother and Father were divorced in October 2004. Pursuant to the final divorce decree, Mother was designated the primary residential parent with Father having regular parenting time every other weekend and on a weekday every other week. During the summer, Father had the children for three weeks, and Mother had them for the remainder of the summer to accommodate a

yearly trip to Germany. Mother was awarded rehabilitative alimony in the amount of \$60,000.¹ Both parties have continued to live in Murfreesboro, Tennessee, since the time of the divorce.

The present case arose after Mother sent Father a letter in November 2006 advising him of her intention to relocate to Berlin, Germany, with the children in May 2007. In her letter, Mother alleged that she was unable to find reasonable employment in the United States, that her education was not recognized in this country, and that she was unable to complete an equivalent degree in the United States. She further alleged that severe medical issues prevented her from attending college classes because she could not sit for prolonged periods and that her health insurance coverage would expire soon. Father filed a petition in opposition to the relocation and to change the primary residential parent in December 2006. In his petition, Father asserted that Mother's proposed relocation did not have a reasonable purpose, posed a threat of specific and serious harm to the children, and was not in the children's best interest. Father requested that the court deny Mother's proposed relocation with the children to Germany; in the alternative, he requested the court modify the parenting plan to give him intervals of time with the children substantially equal to those given to Mother.

Father's testimony

Father testified about his close involvement in the lives of the children. He had never missed a child support payment or failed to exercise all of his parenting time with the children. Father did not feel that Mother supported his relationship with the children. During the previous summer, Mother had not taken the children to Germany during her seven-week block of parenting time, but refused Father's requests to see the children during that time even though they were in Murfreesboro. Father testified that he tried to support the children's relationship with Mother; he bought presents for the children to give Mother for her birthday and Christmas.

As to Mother's proposed relocation, Father expressed his opinion that such a move would be harmful to the children. He feared that his relationship with them would be permanently damaged.

Father's expert

Father presented expert testimony from Dr. Howard Cochran, a professor of economics and international business and a private consultant with companies doing business internationally. Dr. Cochran testified that the cost of living in Berlin, Germany, is greater than in Murfreesboro, Tennessee. Using data from the Economist Intelligence Unit to compare various costs associated with living in both places, Dr. Cochran concluded that the overall cost of living in Berlin is about 66% greater than in Murfreesboro. He presented data showing higher costs of housing, child rearing, household products, transportation, and health insurance premiums. Dr. Cochran also opined that

¹Father appealed from the divorce decree, and this court affirmed the trial court's decision. *Rogers v. Rogers*, No. M2005-00090-COA-R3-CV, 2006 WL 1132043 (Tenn. Ct. App. Apr. 26, 2006) (perm. app. denied Oct. 2, 2006).

the United States offers greater opportunity, including higher real wages and more business freedom, than Germany. Unemployment rates were also higher in Berlin than in Murfreesboro: in 2006, 4.2% in Murfreesboro and 10.8% in Berlin.

When questioned about the process of starting a new business, Dr. Cochran testified that due diligence would require a person contemplating starting a business to formulate a detailed business plan.

At the end of his direct testimony, Dr. Cochran was asked whether it was “reasonable or financially prudent” for a single mother with two children, no job offer, no business plan, no savings, and significant credit card debt to consider a relocation to Berlin, Germany, from Murfreesboro, Tennessee. Dr. Cochran opined that “contemplating such a move given these costs would be unwise, unprudent, ill-advised” and that “you would have to spend as a minimum approximately \$40,000 a year more just to maintain the same standard of living.”

On cross-examination, Dr. Cochran acknowledged that the availability of public transportation in Berlin might make it unnecessary for a person to own a car.

On redirect examination, Dr. Cochran clarified that, even for a person earning Euros, “the percentage that each of those items of food, recreation, transportation take up out of a person’s budget is greater than in Murfreesboro.” He further testified that the cost of living comparisons he had used were also relevant because Mother would be receiving child support payment in U.S. dollars. Dr. Cochran also stated that the tax burden in Berlin would be greater than in Murfreesboro.

Children’s counselor

____ Jamie Langley, a licensed clinical social worker, testified that she had been working with the Rogers children off and on since 2004. Both children had expressed concerns about moving to Germany. Their preference was to stay in Murfreesboro with their mother, but if Mother moved to Berlin, they wished to move with her.

Mother’s testimony

____ Mother testified that she obtained her certificate as a registered dietician in Germany, a certification not recognized in the United States. She thought the German degree was equivalent to two years of junior college in the United States. Mother worked as a licensed dietician in Germany for about four and a half years prior to marrying Father. She testified that she had been a successful freelance dietician, receiving referrals from the U.S. military hospital and using her English language skills to act as a liaison between the U.S. military hospital and German health care providers. She also taught nutrition classes for a military community college.

Mother did not work outside the home during the parties’ marriage. After the divorce, she enrolled in college in Murfreesboro to try to earn a nursing degree but was only able to complete two

semesters as back problems prevented her from tolerating prolonged sitting. On cross-examination, Mother admitted that she had not requested any special accommodations to allow her to continue attending classes. Mother testified that she had tried to find employment in the United States by looking in the newspaper want ads and searching on line. She had submitted applications and had interviews in the public school systems. Mother estimated that she had submitted at least a dozen to 15 job applications since the divorce. At the time of the hearing, she was working part-time at an assisted living facility; she worked on the weekend and earned \$10 an hour. There were no health insurance benefits. Mother stated that she could not take a job that required her to sit all day long because of her medical restrictions. She had to be able to stand up and walk around for five minutes after every hour of sitting and had lifting restrictions.

Mother testified that she had used all of the rehabilitative alimony for tuition and for living expenses such as food and house repairs. Her health insurance ran out in November 2007.

Mother felt there were many possibilities for her to work in Germany and stated that her “ultimate goal would probably be to go back and be a freelance dietician again.” Mother stated that working as a dietician in Berlin would give her the flexibility to sit, stand, or walk around at will and to adjust her work schedule around her back problems. Since Mother had been out of the dietetics field for 15 years, she planned to take some refresher courses in Germany to learn about recent developments in the field. On cross-examination, Mother agreed that her goal was to work part-time when she moved to Germany. She described her employment plans: “[O]nce I’m recertified . . . apply for employment and also definitely look into the possibility of setting up my own practice again. I will explore all options that are open to me.”² Father’s attorney also read into the record Mother’s statement concerning her employment plans from her October 2007 deposition:

The problem is that I cannot apply from here. . . . So what I’m thinking of doing is the freelance first. And while I’m working on my own too, you know, apply to different places and find some, like, part-time employment with somebody. Or I don’t know. I mean, I haven’t—that is what I think is a possibility. It’s also possible that I stay in the freelance field and, you know, if it’s at work—I mean, don’t know. I haven’t—I leave those options open.

As to her projected salary, Mother’s research showed that a dietician in Berlin would make 15 to 20 Euros per hour, or 20 to 25 U.S. dollars per hour. She acknowledged that beginners would likely start out at 8, 9, or 10 Euros an hour.

²Mother also testified that she had been offered a job that would begin after she was recertified as a dietician. Since Mother had not provided this information in response to interrogatories and had only offered it on the second day of trial, the trial court declined to consider it. Mother did not challenge this ruling at trial or on appeal.

Mother's expert

Dr. Joachim Zietz, a professor of economics specializing in international economics, lived in Germany for half of his life. He characterized the data presented by Dr. Cochran as being most relevant to an employee of an American company who is paid in U.S. dollars who moves to Berlin for a year or two. For a person earning Euros, Dr. Zietz opined that there was "no big difference" in purchasing power. He testified that Germany has mandatory health coverage; if a person is unable to pay for health insurance, "the state will take care of it." Dr. Zietz also testified that the German government offers generous programs and financial aid to help the unemployed get back into the job market. He opined that the figure of \$600 a month for rent given by Mother on her statement of expenses was a reasonable estimate for the part of Berlin she had identified.

On cross-examination, Dr. Zietz acknowledged that the current unemployment rate in Berlin was 8.1% as compared to 4.5% in Murfreesboro.

Mother's doctor

_____ Mother also introduced into evidence the deposition of Dr. George Lien, the neurosurgeon who had treated her for her back problems since 2000. He testified that Mother had a lumbar disectomy in April 2000 and lumbar fusion surgery in August 2004. In light of Mother's history of back pain and leg symptoms with recurrent disk herniations and degenerative changes, Dr. Lien restricted her to five pounds of frequent lifting and 15 pounds of occasional lifting. He stated that prolonged, uninterrupted sitting would be difficult for Mother; he advised her not to sit for more than an hour without standing and walking.

Decision of trial court

_____ After hearing all of the evidence, the trial court ruled in Mother's favor, concluding that she had a reasonable purpose for the proposed move. The court made the following findings:

1. That [Mother] has a reasonable purpose to relocate as requested. The Court finds that [Mother] has economic reasons for the relocation.
2. That there is uncertainty in any relocation. That [Mother's] situation in Tennessee versus her situation in Germany indicates that she has a reasonable purpose.
3. That the Court recognizes that counsel for [Father] did not have notice of [Mother's] interim job in Germany. That the Court did not consider the interim job in determining reasonable purpose.
4. That [Mother] is a German citizen. Her certification as a dietician is not recognized in the United States. There are a benefits available in Germany

to return her to the work force and provide her healthcare benefits. That [Mother] has no health insurance in Tennessee.

5. The relocation will allow [Mother] to recertify and get her back into her profession.

The court concluded that Mother met the statutory requirements of the relocation statute.

STANDARD OF REVIEW

We review the trial court's findings of fact de novo with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). Where the trial court did not make findings of fact, we must "conduct our own independent review of the record to determine where the preponderance of the evidence lies." *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). We review questions of law de novo with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

ANALYSIS

Tennessee has a statute that governs parental relocation, Tenn. Code Ann. § 36-6-108. In this case, there is no dispute that, pursuant to the parenting plan incorporated in the divorce decree, Mother spends substantially more time with the children than does Father. Therefore, the relevant provisions are found at Tenn. Code Ann. § 36-6-108(d), which states that the court must permit the primary residential parent to relocate with the minor children unless:

- (A) The relocation does not have a reasonable purpose;
- (B) The relocation would pose a serious threat of specific and serious harm to the child that outweighs the threat of harm to the child of a change of custody;
- (C) The parent's motive for relocating with the child is vindictive in that it is intended to defeat or deter visitation rights of the non-custodial parent or the parent spending less time with the child.

The burden of proof is upon the parent opposing the relocation to establish one of these three grounds. *Clark v. Clark*, No. M2002-03071-COA-R3-CV, 2003 WL 23094000, *3 (Tenn. Ct. App. Dec. 30, 2003). If the opposing parent cannot prove any of the three grounds, the relocation shall be permitted. Tenn. Code Ann. § 36-6-108(d).

In this appeal, Father argues that the trial court erred in finding a reasonable purpose to support Mother's relocation with the minor children and in failing to find that the proposed relocation presented a substantial risk of harm to the children. Father further argues that the trial court should have determined that the proposed move was not in the best interest of the children.

Because we have concluded, for reasons discussed below, that Father met his burden of proving that Mother's proposed relocation lacked a reasonable purpose, we need not address the substantial harm issue.

In her answer to Father's petition in opposition to the proposed relocation, Mother alleged that "[t]he relocation has a reasonable purpose in that [Mother] will be able to obtain employment and health insurance in Germany." Father asserts that the proposed relocation has no reasonable purpose because Mother's educational and employment plans are speculative. Each side cites cases to support his or her position. This court has previously declined to adopt bright-line rules with regard to circumstances or factors that will constitute a reasonable purpose for a proposed relocation. See *Slaton v. Ray*, No. M2004-01809-COA-R3-CV, 2005 WL 2756076, *2 (Tenn. Ct. App. Oct. 24, 2005). Rather, we recognize that such determinations are fact-intensive and require a thorough examination of the unique circumstances of each case. *Id.*

While the trial court did not make detailed factual findings, the court did state its conclusion that Mother's relocation was supported by "economic reasons." This court has consistently held that a salary increase and opportunities for career advancement can support a finding of reasonable purpose. See *Dye v. Fowler*, No. M2006-01896-COA-R3-CV, 2007 WL 1515140, *3 (Tenn. Ct. App. May 23, 2007) (citing *Roberts v. Roberts*, No. E2005-01175-COA-R3-CV, 2005 WL 2860199, *6 (Tenn. Ct. App. Oct. 31, 2005) and other cases). Previous decisions have also cited the following economic factors: "the relative significance of the [pay] increase, the cost of living in the proposed location compared to the present location, the firmness of the job offer, opportunity for career advancement and economic betterment of the family unit." *Slaton*, 2005 WL 2756076 at *3. In the present case, the preponderance of the evidence does not support the trial court's determination that economic factors provide a reasonable purpose for Mother's proposed relocation.

The evidence considered by the trial court indicates that Mother had no firm job offer at the time of the hearing. Her plan was to take refresher courses to update her dietitian certificate and then find a part-time job. Yet, Mother could not take college courses in Murfreesboro because she could not tolerate prolonged sitting due to her back problems. Mother had no concrete information about the salary she would make as a part-time dietitian. Mother testified that a dietitian in Berlin could make 15 to 20 Euros, about 20 to 25 U.S. dollars, an hour, but that a person starting out would make 8 to 10 Euros per hour. At the time of the hearing, Mother was making \$10 an hour at her job in Murfreesboro. Mother would be entering the job force in Berlin after a 15-year absence. The preponderance of the evidence does not support a finding that Mother would be earning more money, or would even have a job, in Berlin. Previous cases in which employment has been a major factor in justifying relocation have involved evidence of a firm offer. See *Price v. Bright*, No. E2003-02738-COA-R3-CV, 2005 WL 166955, *11 (Tenn. Ct. App. Jan. 26, 2005) (better job offer and family support system); *Bell v. Bell*, No. E2004-02964-COA-R3-CV, 2005 WL 2860284, *6 (Tenn. Ct. App. Oct. 31, 2005) (concrete job offer); *Collins v. Coode*, No. M2002-02557-COA-R3-CV, 2004 WL 904097, *4 (Tenn. Ct. App. Apr. 27, 2004) (promotion and substantial pay increase); cf. *Robinson v. Robinson*, No. M2003-02289-COA-R3-CV, 2005 WL 1541861, *7 (Tenn. Ct. App.

June 30, 2005) (rejecting relocation to obtain esthetician license; no evidence of income, benefits from proposed job).

Mother asserts that her ability to work is severely limited by her back problems and that her back problems prevented her from completing a nursing degree. Her doctor testified by deposition that Mother needed to stand and walk after sitting for an hour. On cross-examination, however, Mother admitted that she had not requested any accommodations at school to allow her to move around every hour so that she could attend classes.

Dr. Cochran testified that the cost of living in Berlin is significantly higher than the cost of living in Murfreesboro. While questioning the relevance of some of the data relied upon by Dr. Cochran, Dr. Zietz did not offer countervailing data. Moreover, Dr. Zietz and Dr. Cochran agreed that Berlin has a significantly higher unemployment rate than Murfreesboro.

Mother emphasizes that she no longer has health insurance, that she does not qualify for Cover Tennessee,³ and that her back condition would be considered a pre-existing condition for at least one year if she purchased insurance through a private insurance company. According to Mother and Dr. Zietz, Germany offers mandatory health insurance coverage for all of its citizens on a sliding scale of cost. While we are sympathetic to Mother's difficult situation, this court does not agree with the trial court's reliance on the health benefits available in Germany as a reason to support her relocation with the parties' children under the circumstances of this case.

In a recent decision, *Webb v. Webb*, No. E2008-00862-COA-R3-CV, 2009 WL 348362 (Tenn. Ct. App. Feb. 11, 2009), this court affirmed the trial court's decision to permit a mother to relocate from Tennessee to the Cayman Islands with the parties' minor child. While the mother in *Webb* did not have a definite job offer at the time of the hearing, she put on proof from several witnesses concerning the job opportunities and career advancement as well as the high standard of living in the Cayman Islands. *Webb*, 2009 WL 348362, at *3. Mother had already received several job offers that she had been unable to formalize due to the uncertainty of her move. *Id.* Moreover, mother put on proof of significant family support in the Cayman Islands. *Id.* Based upon the entire record, this court concluded that the evidence did not preponderate against the trial court's finding that the mother's relocation had a reasonable purpose. *Id.* We find *Webb* to be distinguishable from the present case based upon the totality of the circumstances in *Webb*, particularly the evidence of good job prospects and the availability of family support.

As we have previously stated, mere "belief and hope" in the possibility of career advancement is not sufficient to establish a reasonable purpose. *Slaton*, 2005 WL 2756076, at *3. We believe that Father met his burden of proving that Mother's plans in this case represent little more than belief and hope without a solid foundation. Mother does not have a job offer with a higher salary and does not have a business plan for establishing her own business. Looking at the

³ A program of the State of Tennessee that helps provide affordable health insurance for the uninsured.

totality of the circumstances, we conclude that the evidence does not support the trial court's determination that Mother's proposed relocation had a reasonable purpose.

In accordance with Tenn. Code Ann. § 36-6-108(d), the trial court did not consider the best interest of the children because the trial court found a reasonable purpose for Mother's proposed relocation. As we have determined that the evidence preponderates against the trial court's finding of a reasonable purpose, we remand the case to the trial court for a determination of the children's best interest pursuant to Tenn. Code Ann. §36-6-108(e). In making this determination, the trial court should consider the effect of the proposed relocation upon the children.

The decision of the trial court is reversed, and the case is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed against the appellee, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE